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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-37**

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians *ad litem*, on her own behalf and on behalf of all others similarly situated,

*Petitioners,*

—v.—

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

*Respondents.*

## PETITIONER'S REPLY BRIEF

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# PETITIONER'S REPLY BRIEF

## I.

To side-track adjudication of an issue plainly warranting this Court's plenary review, respondents conjure up a flaw in the district court's class action determination. Respondents concede plaintiff below properly alleged Rule 23(a) and (b)(2)

class action prerequisites and properly moved for class action determination. Their critique targets District Judge Newcomer's performance. In support, respondents rely exclusively on Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975), a decision that does not do the service claimed for it.

Board of School Commissioners v. Jacobs was decided February 18, 1975. The district court judgment in the instant case issued August 7, 1975. Respondents never questioned in the district court or in the court of appeals the form or style of Judge Newcomer's class action determination. The citation to Board of School Commissioners v. Jacobs makes its initial appearance in respondents' Brief in Opposition.

Respondents' afterthought, raised for the first time in this Court, is insubstantial. In Board of School Commissioners v. Jacobs, this Court addressed a judgment furnishing no class definition at all. There, the district court certified "the class whose interests the plaintiffs seek to protect." In contrast to that opaque designation, District Judge Newcomer, in the case at bar, defined the class with precision: "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." In short, the class description requirement of Rule 23(c)(3) is plainly met.

Respondents object in passing to District Judge Newcomer's timing of the class certification. Judge Newcomer reserved decision



on the class action motion until judgment, a practice commonly followed by district courts in Rule 23(b)(2) cases of this genre. As recently explained in Jimenez v. Weinberger, 523 F.2d 689, 697-99 (1975) (Stevens, C.J.),[1] Rule 23 affords the district judge, in appropriate cases, flexibility to defer certification "until the moment the merits are decided"; the Rule permits "the entry of a single order determining both the merits and the identity of the members of the class." Jimenez, supra, at 697, 698. While Rule 23 (c)(1) calls for class action determination "as soon as practicable," nowhere does the Rule explicitly or implicitly strip the district court of authority in (b)(1) and (b)(2) cases "simultaneously to define the class and to adjudicate the merits." Jimenez, supra, at 698, 699. In actions in which notice to class members is mandatory, specifically, (b)(3) actions, early certification is imperative to afford members a meaningful opportunity to request exclusion from the class. But the reasons for certification at a preliminary stage in a (b)(3) action surely do not apply in the (b)(2) case at bar where the sole relief sought is injunctive and no "opt out" feature is involved. And plainly, respondents do not suggest, nor could they, any conceivable prejudice to their position based on the timing of the class determination and definition.

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[1] Jimenez was decided September 12, 1975, several months after and in light of this Court's decision in Board of School Commissioners v. Jacobs. See 523 F.2d at 700 n.26.

A final newly discovered flaw respondents urge in support of their "invalid class certification, ergo moot" position is the absence in District Judge Newcomer's order of specific findings enumerating each prerequisite of Rule 23(a). For the proposition that valid certification requires ritualistic incantation by a district judge of each 23(a) subpart, respondents cite only Board of School Commissioners v. Jacobs. Nowhere in Jacobs did this Court cite as the flaw fatal to effective certification the district court's failure to spread out in findings of fact the 23(a)(1)-(4) formulae. Nor does Rule 23(c) command such findings. The complaint, motion papers and hearing record fully set out and document the Rule 23(a) prerequisites and the basis for (b)(2) certification. Under the circumstances, Judge Newcomer's conclusion as to the propriety of class action determination is fully supported.

Unlike Board of School Commissioners v. Jacobs, where the student newspaper that triggered the dispute between students and school board had ceased publication before the case reached this Court, a continuing controversy exists between the academically gifted girls who compose the class herein and the Philadelphia School District. Members of the class still find the door to Philadelphia's oldest and most celebrated school closed to them because of their sex. Beyond question, a vital controversy continues for a well-defined class so long as females are denied access to Philadelphia's Central High School. Consistent with the Court's clear



and recent precedent, the continuation of this genuine controversy between class members and respondents precludes a mootness disposition in this case. Sosna v. Iowa, 419 U.S. 393 (1975).[2]

II.

Finally, it bears emphasis that the position of the class herein is unfairly and inaccurately summarized by respondents and the court of appeals majority. Philadelphia's academically gifted young women who seek access to Central, far from conceding their opportunities are "essentially equal," challenge a system they regard as pervasively unequal. A tangible difference impossible to shroud, Central's facilities in the scientific field "are superior." 532 F.2d at 882. But a deeper inequality, more harmful to Philadelphia's bright young women, is a central feature of this case.

Central, for generations, has been the training ground for those destined to become the community's dominant actors; Girls has been the place for the sex long considered subordinate. No doubt this compartmentalization has a "long history" and "world-wide acceptance." But upon objective, unromanticized

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[2] Cf. DeFunis v. Odegaard, 416 U.S. 312, 317 (1975), in which the Court pointed out "DeFunis did not cast his suit as a class action" but sought relief for himself alone.

appraisal of that "history" and "acceptance"

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.[3]

In a world and nation with "a long and unfortunate history of sex discrimination,"[4] all-male institutions for superior students impede women's opportunities to establish themselves in academia, business, the professions, and politics as fully equal to men.

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[3] Green v. Waterford Board of Education, 473 F.2d 629, 634 (2d Cir. 1973).

[4] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).



## Conclusion

For the foregoing reasons, and the reasons stated in the petition, certiorari should be granted.

Respectfully submitted.

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